**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MAXINE C. CATRON**<br>Claimant | ) | |
| VS. | ) | |
| **HARRAH'S KANSAS CASINO CORP.**<br>Respondent | ) | Docket No. 1,016,236 |
| AND | ) | |
| **CRUM & FORSTER INDEMNITY CO.**<br>Insurance Carrier | ) | |

## ORDER

Claimant requested review of the September 28, 2005 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on December 20, 2005.

### APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. D'Ambra M. Howard, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Because claimant's injury is limited to a scheduled recovery, at oral argument the parties' agreed there is no dispute that respondent is entitled to a credit against claimant's award, if any, in the amount of $574.95 for temporary partial disability benefits paid during the pendency of this claim. Thus, that portion of the ALJ's Award is hereby affirmed.

### ISSUES

The ALJ found claimant suffered a new 3 percent permanent impairment to her right upper extremity[1] as a result of her December 2003 accident. In coming to this finding, the

[1] All ratings are to the right upper extremity.

ALJ considered the functional impairment assessments made by Dr. Zimmerman (who opined claimant bore a total of 17 percent, 6 percent of which he attributed to this accident) and Dr. Baker (who opined claimant had no increase in impairment beyond the 11 percent assessed in 1998 for an unrelated accident). Both assessments were based upon claimant's loss of range of motion and the ALJ found them to be equally persuasive. Thus, he merely split the difference between the two opinions and awarded a 3 percent permanent partial impairment.

The claimant requests review of the nature and extent of her disability attributable to the December 15, 2003 work injury, and whether it should be reduced by any pre-existing impairment. Claimant seems to concede claimant bears a pre-existing impairment due the 1997 injury, but argues that respondent failed to adequately prove the extent of that impairment. Having failed to sufficiently establish pre-existing impairment, claimant is entitled to the full value of the impairment ratings offered by Dr. Zimmerman.

Respondent argues the claimant's shoulder complaints represent only a temporary exacerbation of her pre-existing impairment, with no additional permanent residual impairment that justifies compensation. In the alternative, respondent suggests the Board should affirm the ALJ's finding of a 3 percent permanent impairment.

The only issue to be resolved by this appeal is the nature and extent of claimant's impairment.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant first suffered injury to her right shoulder in 1997. Claimant was treated by Dr. Brett Wallace who performed surgery to repair her torn rotator cuff. Following surgery and recovery, he rated her utilizing the range of motion measurements taken by the physical therapist employed in his office. Dr. Wallace assigned an 18 percent total, with 11 percent attributable to the loss of range of motion, 4 percent strength and 3 percent damage to the musculature. Claimant was permitted to return to work without restrictions. According to Dr. Wallace, the nature of her job activites did not require any overhead activities and as such, she required no special restrictions.

On December 15, 2003, claimant again suffered injury to her right shoulder while cleaning a shower stall, this time while in respondent's employ. Respondent sent claimant to see Dr. Wallace as he had treated her for the earlier injury. On February 20, 2004, claimant had an MRI done on her right shoulder which revealed "intact anterior and posterior glenoid labra and degenerative changes in the right acromioclavicular joint and in the head of the right humerus." According to Dr. Wallace the MRI showed that

claimant's supraspinatus muscle had atrophied and retracted overtime.[2] In other words, there was little or no muscle available to help the shoulder do its work. Dr. Wallace testified that he believed, based upon the language contained in his office notes, that he reviewed the MRI films itself rather than relying upon the radiologists evaluation of the film.[3] He further believed that claimant's present complaints were a natural outgrowth of her original injury in 1997 and due to her severely degenerative shoulder.[4] Finally, Dr. Wallace testified that he felt there would be no value to any repeat surgery for claimant.[5] He opined that claimant's present complaints are due to the loss of her supraspinatus tendon and not due to any new rotator cuff pathology. In this respect, Dr. Wallace disagreed with the radiologist as the radiologist's report indicates a torn rotator cuff.

On July 23, 2004 Dr. Wallace felt that claimant was at maximum medical improvement. He diagnosed claimant with degenerative rotator cuff and released her from care with restrictions. She was limited to no repetitive lifting above shoulder level, however she was allowed to occasionally lift using a two-handed lift up to 10 to 15 pounds.[6] Dr. Wallace was unwilling to issue any sort of permanency rating and referred claimant to another orthopaedic surgeon within his office, Dr. Phillip L. Baker.

Claimant saw Dr. Baker on November 2, 2004 for an examination to determine impairment for her injuries allegedly sustained while in respondent's employ in 2004. After reviewing the earlier medical records, including the MRI, and examining the claimant himself, Dr. Baker assigned claimant an 11 percent impairment based upon claimant's loss of range of motion. It was Dr. Baker's opinion that claimant had no additional impairment to her right shoulder beyond that assessed in 1998. Dr. Baker also concurred with Dr. Wallace's opinion that surgery at that point would not improve claimant's condition. He felt that claimant would be better off simply maintaining her range of motion in her right shoulder.

Like Dr. Wallace, he concluded claimant had no re-tear of her rotator cuff. Instead, he concluded (based on the MRI) that she was experiencing a "natural thinning and atrophy" of the tendon over time.[7] He further testified that his rating was based upon the range of motion measurements performed by the physical therapists and their assistants employed in his office and that he would confirm their measurements in his own examination.

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[2] Wallace Depo. at 13.

[3] *Id.* at 37.

[4] *Id.* at 14-15.

[5] *Id.* at 16-17.

[6] *Id.* at 17.

[7] Baker Depo. at 49.

Claimant saw Dr. Daniel Zimmerman on November 10, 2004 at the request of claimant's attorney. Dr. Zimmerman examined claimant and opined that claimant had a "secondary to a re-tear of the right rotator cuff casually related to the work injury in her employment . . . in mid December, 2003 when working as a housekeeper, [and] that Miss Catron has sustained permanent partial impairment of the right upper extremity at the shoulder level which should be rated at 17%".[8] His conclusion that claimant sustained a re-tear is based solely upon the radiologist's report which interpreted the MRI films.

Dr. Zimmerman testified that he issued his impairment rating without the benefit of Dr. Wallace's February 10, 1998 rating report. But after having an opportunity to review that document, he testified that he did not agee with Dr. Wallace's opinions. First, he indicated that Dr. Wallace relied upon range of motion results that were measured by a physical therapist rather than performing the tests himself. Dr. Zimmerman believes the *Guides*[9] require the physician perform these tests. Therefore, he believes that the impairment rating assigned by Dr. Wallace is incorrect.

Dr. Zimmerman also testified that Dr. Wallace's physical therapists apparently failed to use a goniometer to perform the range of motion test and double weighted claimant's weakness. Assuming Dr. Wallace actually had performed the range of motion tests with a goniometer as required by the *Guides*, then at most, claimant bore a 14-15 percent functional impairment as a result of her 1997 injury.

Setting aside Dr. Zimmerman's criticisms of Dr. Wallace's evaluation process, the impairment ratings to claimant's shoulder are not drastically different when looking exclusively at the range of motion. In 1998, Dr. Wallace concluded she had an 11 percent impairment and again in 2004, after her most recent injury, Dr. Baker came to that same conclusion. Only Dr. Zimmerman found a higher number, assessing 17 percent. The ALJ merely split the difference between the two 2004 ratings, giving credit for the 11 percent Dr. Baker assessed for the 1997 injury. The ALJ explained that "[r]ange of motion measurements are by nature imprecise, as these can be manipulated somewhat by the patient, and depend in part upon whether the patient is having a good day or a bad day."[10] Because he was equally persuaded by both opinions, he merely split the zero (the lack of additional permanency) and the additional 6 percent (17 percent less 11 percent pre-existing) and awarded 3 percent. The Board considers the ALJ's approach to be reasonable.

Likewise, the Board is not persuaded by Dr. Zimmerman's criticisms of Drs. Wallace and Baker's methodology. Both Dr. Wallace and Dr. Baker testified that they routinely rely

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[8] Zimmerman Depo., Ex. 2 at 5 (Nov. 10, 2004 IME Report).

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[10] ALJ Award (Sept. 28, 2005) at 3.

upon the range of motion measurements taken by their physical therapists. More importantly, the doctors further testified they confirm those measurements during their evaluation, sometimes agreeing with results and sometimes not. Dr. Baker testified that he uses a goniometer in taking those measurements and he knows of no requirement that he perform all of the diagnostic tests himself when performing an evaluation. It is clear these physicians used their independent medical judgment in forming their opinions. Accordingly, Dr. Zimmerman's complaints are rejected and the 3 percent permanent partial impairment awarded by the ALJ is affirmed.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated September 28, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director